



Generally Speaking

COMINGS and GOINGS

The Anchorage DAO welcomed **LOA Jacklyn Casey** to the Violent Crimes Unit.

On November 1, RAPA Section's **AAG Sam Cason** converted from part-time to full-time status as one of the section's litigation counsel.

The Labor and State Affairs Section sadly said good-bye to **AAG Kathleen Strasbaugh**, who left the department and state on November 14. The department wishes her a joyous retirement.

The Juneau Natural Resource and Child Protection Sections welcomed **LOA I Ashlee Bonham** who transferred from the Anchorage Child Protection Section.

On November 1, **ADA Wayne Cary** joined the Nome DAO. ADA Cary previously worked in Nome as an AAG handling CINA matters.

On November 21, **ADA Paul Roetman** completed his tenure with the Kotzebue DAO. The offices wish him and his family the best as they return to Palmer. Replacing him is **ADA Angela Jamieson**, formerly of the Kenai DAO. In her short time in Nome, ADA Jamieson has already accomplished a smooth transition.

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CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

In an attempt to keep the children safe in the family home, OCS had been working with a family for several months to address issues of substance abuse and general neglect. The children had been staying with their grandfather until he could no longer care for them. Because no other family members were available to care for the children, and the father of one of the children could not be located, OCS assumed emergency custody.

OCS assumed emergency custody of an infant after it was born exposed to drugs. It was also reported that the mother was not bonding to the child or being attentive to the child in the hospital. The father has other children in state's custody.

OCS assumed emergency custody of two children when it learned that the children were being left

unsupervised in the care of parents who have substantial drug and alcohol issues. OCS had been working with them to address those issues prior to taking custody of the children. Unfortunately, those efforts were unsuccessful.

The Anchorage Police Department responded to a disturbance at a hotel. When they arrived, they found a mother too intoxicated to care for her 19-month-old child. The mother has a history of substance abuse and the father is unavailable to care for the child. OCS assumed emergency custody.

OCS assumed emergency custody of four children when they were found in a hotel with their caretaker, a registered sex offender, who was too intoxicated to care for them. The mother was at a bar and was not found until after the bars closed. The mother reported using drugs in front of the children and that she was the victim of multiple incidents of domestic violence.

Witnesses saw a woman with a child in the back seat drive over a curb and strike a tree. When the Anchorage Police Department responded, the mother admitted drinking to intoxication in the car. The mother could not identify anyone available to care for her child, so OCS assumed custody.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Commercial and Fair Business

Architects, Engineers and Land Surveyor Board Disciplines Land Surveyor

On November 6, at its regular meeting, the State Board of Registration for Architects, Engineers, and Land Surveyors (AELS Board) adopted, with revisions, the proposed decision of Administrative Law Judge (ALJ) Terry Thurbon

and imposed a fine of \$1000 (with \$500 suspended) and a reprimand against Kenai registered professional land surveyor (and current AELS board member) Clifford Baker. This decision was based on a finding that Baker failed to include all relevant and pertinent information known to him in a report he prepared in connection with a survey. Baker was hired to perform a survey in a boundary dispute between the owners of Lots 12 and 13 of Larsen Bay on Kodiak Island. A prior surveyor in the dispute had found three of Lot 12's original monuments (established during the BLM survey of the town site in 1969) and he based his survey on those monuments, even though their location conflicted with the plat for that subdivision. Baker, on the other hand, found only two of those original monuments, and he disregarded them because of their condition. He resorted to a method of last resort called proportioning, which should only be used when the original monuments cannot be found. An arbitrator later found that the prior surveyor's survey would constitute the boundary line because the location of the original monuments was dispositive. A complaint against Baker was filed with the Division of Corporations, Business and Professional Licensing (Division) and a four day disciplinary hearing took place in Anchorage in May 2008.

ALJ Thurbon found that Baker made a "mistake" by resorting to proportioning without investigating the credibility of the monuments found by the prior surveyor as fully as other surveyors would have done under the circumstances; however, she also found the evidence was not so "unequivocal" as to compel the conclusion that his conduct failed to perform to applicable professional standards. Nevertheless, the ALJ Thurbon determined that Baker violated 12 AAC 36.210(a)(4), which requires that all reports contain "all relevant and pertinent information" known to the surveyor, because Baker's report did not explain why he found it appropriate to prepare a new survey using proportioning, rather than a re-tracement survey incorporating the monuments that were found. ALJ Thurbon then concluded that Baker's conduct constituted

misconduct, defined at 12 AAC 36.330(4) as a failure to perform a registrant's responsibilities under AS 08.48 and the regulations, which is grounds for discipline under AS 08.48.111(2). Despite the fact that the disciplinary guidelines provide for up to a year's suspension for misconduct, ALJ Thurbon concluded that imposing a suspension of any length would be inappropriate to the single violation proven. As to the sanctions that were recommended and adopted, the AELS Board revised the wording of ALJ Thurbon's proposed reprimand and removed the language chastising Baker for creating the appearance of prejudging the outcome of the boundary dispute, for failing to uphold the ethical standards of his profession and for detracting from the professionalism he must maintain in order practice land surveying. AAG Robert Auth represented the division in this proceeding.

Case Remanded Back to Medical Board

On November 20, Anchorage Superior Court Judge Jack Smith ruled on Dr. Mark Beirne's appeal of the State Medical Board's denial of Beirne's application for reinstatement of his previously surrendered license by remanding the case back to the board for reconsideration of his application. Beirne has been licensed as a physician in Alaska from 1989 until 1995, when he surrendered his license due to his abuse of alcohol. In 1997, Beirne opened up a clinic in Anchorage and practiced medicine on a regular basis until 1998, when the Division of Corporations, Business and Professional Licensing (Division) issued a cease and desist order against him for practicing medicine without a license. In 2001, Beirne relocated to Georgia, stopped drinking, and in 2005 he applied for reinstatement of his surrendered license. The Board denied the request in 2006 and Beirne requested a hearing, which took place in Anchorage in February 2007. The Administrative Law Judge's (ALJ) proposed decision, adopted by the Board on October 25, 2007, affirmed the prior denial based on 12 AAC 40.965(a)(1)(C), which provides that a voluntarily surrendered license will be reinstated if the board determines (among other criteria) that the applicant has committed no

grounds for imposition of disciplinary sanctions under AS 08.64.326. The ALJ interpreted the regulation to mean that Beirne's license could not be restored unless the Board determined that, since his surrender, Beirne had committed no act that would be grounds for disciplinary sanctions. The ALJ then concluded that the board could not make that determination in this case because, after his surrender, Beirne practiced medicine in Alaska without a license, which is considered unprofessional conduct under AS 8.64.326(a)(9).

In his appeal, Beirne challenged the above regulation on the grounds that it was inconsistent with the enabling statute, and that it violated the due process and equal protection causes of the Alaska Constitution, as well as the Americans with Disabilities Act, because it resulted in a lifetime ban against reinstatement. While the court rejected all of these arguments, it was sympathetic to Beirne's situation and determined that the board's interpretation of the regulation was erroneous. The court held that the criteria for reinstatement of a surrendered license should not be more onerous than the criteria for reinstatement of a suspended or revoked license, which under AS 08.64.331(d) requires only that the applicant be able to practice with reasonable skill and safety. Specifically, the court determined that the case would be remanded and that, on reconsideration, the board would not be prohibited from reinstating Beirne's license, regardless of the finding it makes under 12 AAC 40.965(a)(1)(C). AAG Robert Auth represented the division in the administrative hearing and the board on appeal.

Disciplinary Hearing Held Against Big Game Guide

On November 4, a disciplinary hearing was held in Anchorage against Texas guide-outfitter James Smith. The Division of Corporations, Business and Professional Licensing (Division) presented evidence that Smith was convicted eight times in state court based on a brown bear hunt that he guided in 2004. Specifically, Smith was convicted of providing hunting services to three hunters outside the use area for which he was registered, of providing false information on the sealing certificates for two brown bears harvested

during that hunt, and for failing to provide hunt reports for the three hunters. Under AS 08.54.710(a)(1), the Big Game Commercial Services Board can discipline a licensee who is convicted of a violation of any state or federal statute or regulation related to hunting or to the provision of big game hunting services. The division also presented evidence of four additional federal convictions against Smith based on a mountain goat hunt he guided in 2004. Specifically, Smith guided two hunters on National Forest System lands in Prince William Sound without the required Forest Service Special Use Authorization, in violation of 36 CFR 261.10(c) (unlawful to sell or offer for sale any merchandise or conduct any kind of work activity or service unless authorized by Federal law, regulation, or special-use authorization) and the Lacey Act. Finally, the division presented evidence that Smith failed to disclose the above federal convictions on his most recent renewal for licensure. A proposed decision from the administrative law judge is expected in the next few months. AAG Robert Auth represented the division in this proceeding.

Environmental

Alaska Coastal Management Program

The Alaska Coastal Management Program began a re-evaluation process of its governing statutes and regulations. After several public meetings with interested stakeholders, the Department of Natural Resources released proposed statutory and regulatory changes to the program. Public meetings will continue into December, and the goal is to deliver a bill to the legislature that addresses the concerns that have been raised about the program in the recent past.

Alaska Pollution Discharge Elimination System (APDES) Project

The state's application to the Environmental Protection Agency (EPA) to take over the program for permitting disposal of pollutants in

surface waters has been approved. Alaska is one of five states not to have assumed that permit program from EPA. To get EPA approval of a state program, the Alaska Department of Environmental Conservation (ADEC) demonstrated that it has the authority to run a program no less stringent than EPA's under the federal Clean Water Act. For more information on this project, see the website at:

<http://www.dec.state.ak.us/water/npdes/npdes.htm>

Human Services

Section Chief Stacie Kraly continues to work on implementing the remand in *Baker v. Department of Health and Social Services*. The notice issue appears to be resolved, but the section is now engaged in additional briefing on the issue of whether the concept of material improvement applies to personal care and whether or not the state is required to pay corrective payments to recipients who received deficient notice.

AAG Libby Bakalar won her motion to dismiss/motion for summary judgment in the *Smart v. Department of Health and Social Services* matter. This was a huge win for the department. The court ruled the process by which the department extrapolates for overpayments in its medicaid audits was valid, and was not a regulation subject to the Administrative Procedure Act. Judge Tan also ruled that Ms. Smart failed to exhaust her administrative remedies and dismissed the lawsuit.

AAGs Laura Derry and Erin Pohland conducted a multi-day bench trial related to a petition for court ordered medication for a respondent who had been committed to the Alaska Psychiatric Institute. The matter involved significant pre-trial discovery, pre-trial motion practice, and a complicated evidentiary hearing that lasted over a week. The section is waiting for a decision. Judge Morse presided over the hearing.

AAG Rebecca Polizzotto represented the state in a hearing based upon an ex parte motion for a temporary restraining order; after a hearing on the merits, Judge Tan denied the motion in its entirety.

AAG Kelly Henriksen is working on the Alaska Supreme Court brief in *Mat-Su Valley Hospital v. Advanced Medical*. This appeal is related to the superior court's decision to grant the state and Advanced Medical's motions for summary judgment.

Medicaid

This past month the third-party liability team settled 12 cases for \$26,912.34.

Licensing

AAGs Rebecca Polizzotto and Libby Bakalar resolved a major revocation hearing (related to a day care facility) prior to the hearing in Anchorage.

Other

AAG Laura Derry attended a national conference in Alabama for state attorneys who work in the field of mental health. AAG Scott Friend presented at the Elder Law committee of the state bar association on the estate recovery process.

Labor and State Affairs

Education

Mat-Su Borough School District v. State. AAG Neil Slotnick is involved with motion practice in this case concerning special education intensive funding. The Mat-Su Borough School District claims that the Department of Education and Early Development's regulations and procedures for intensive funding violate federal and state special education laws. The court dismissed claims about the validity of regulations, except

for a claim that the department applied a policy that it should have adopted in regulation. The court found this latter claim appropriate for trial. After this ruling, Mat-Su amended its complaint to add a damages claim. The department then moved to dismiss the damages claim. The department's position is that a school district may not be awarded damages for its failure to apply for education funding: a district must first apply for the funding, complying with the department's administrative procedures, which Mat-Su failed to do.

Moore v. State. This month AAG Neil Slotnick filed proposed findings of fact and conclusions of law with the court after the end of the second trial. The one issue remaining is whether the state is required to provide more oversight of school districts with a record of very poor educational performance. The state is represented in this matter by AAG Neil Slotnick and retired Chief Assistant Attorney General (Criminal Division) Dean Guaneli with assistance from paralegal Terry Begley-Allen.

Elections

AAGs Sarah Felix and Mike Barnhill were busy during the month with matters relating to the November 4 general election, including advice to the Division of Elections during the ballot count and on public records questions. Ballots were being counted through November 25 and the division projected that it could certify the election during the week of December 1.

Alaska Republican Party v. State of Alaska Division of Elections. On November 12, the Alaska Republican Party filed an appeal from the Division of Elections' decision that Christopher Tuck was a qualified candidate for House District 29. In its appeal, the Republican Party argues that Mr. Tuck is not qualified because his legal name is Mestas and he resides outside of the district. Mr. Tuck was the prevailing candidate. AAG Sarah Felix is handling the case.

Nick v. Bethel and Alaska. AAG Sarah Felix, assisted by paralegal Terry Begley-Allen, has been working with Division of Elections staff to comply with a requirement in the court's preliminary injunction to report before and after each election in 2008. On October 16, 2008, the division filed its fourth election report, explaining the Division of Elections' plan to provide minority language assistance to Yup'ik voters in the Bethel census area for the general election. The reports include a list of bilingual poll workers and their language assistance training, a description of bilingual Yup'ik/English advertising about the election, a description of planned outreach to Alaska Native villages about language assistance, and copies of sample ballots translated into written Yup'ik. On November 6, the division filed the regional education attendance area (REAA) and coastal service resource area (CRSA) post-court report, describing the actual services to Yup'ik speaking voters in the Bethel census area for the 2008 REAA and CRSA elections. The division will file its post-general election report in December.

Procurement

Wilton Adjustments v. Division of Administrative Services. The state settled the bid protest in this case before the hearing scheduled for November 18-19 before the Office of Administrative Hearings. The protest concerned a request for a proposal (RFP) to provide statewide claims adjusting services for the Division of Risk Management. Wilton Adjustments was not selected and filed this protest alleging bias towards the incumbent, ambiguity in the RFP language, and arbitrary scoring. After an ambiguity was confirmed, the parties settled the appeal. Wilton agreed to withdraw its protest appeal and the division agreed to withdraw the notice of intent to award and to cancel the RFP. The division will re-solicit proposals. AAGs Margie Vandor and Rachel Witty represented the division.

Retirement and Benefits

Alaska Retirement Management Board v. Mercer, Inc. On November 7, after a motion by the board, Federal District Court Judge Holland remanded this action to state court, where it had been filed initially. The action is against the state's former actuary for advice concerning the state's retirement investment funds. AAG Mike Barnhill and Paul Weiss of Rifkind Wharton & Garrison, LLP, are counsel for the board.

Shirley Shea v. Division of Retirement and Benefits. AAG Brenda Page argued this case before the Alaska Supreme Court. It involves the superior court's dismissal of Ms. Shea's appeal from a decision of the Office of Administrative Hearings denying her claim for occupational disability benefits against the state. Judge Aarseth dismissed the superior court appeal because Ms. Shea did not timely file it or show good cause for the delay. Ms. Shea argued that she tried to file the appeal on the last day of the filing period but, due to a series of errors, was not able to file a proper appeal until six days later. The state's position was that the court did not abuse its discretion when it concluded that enforcement of the deadline did not cause "surprise and injustice." The Court disagreed and on November 7 issued an order reversing the dismissal and allowing the appeal to proceed. (former AAG Gina Ragle handled the briefing before she retired).

This month Chief Administrative Law Judge Thurbon issued a proposed decision affirming the Division of Retirement and Benefits' refusal to change the method it uses to calculate an occupational disability benefit. In this case, a former state employee objected to the way the division calculated his income for purposes of determining benefits. At issue was whether the division could rely on a methodology that it had not adopted as regulation. ALJ Thurbon determined that the division's method was reasonable. AAG Joan Wilkerson handled this matter.

Special thanks to AAGs Anne Johnson, Bill Milks, Joan Wilkerson, Office Manager Jennifer Ditcharo, and LOA II Angie Hobbs, who all helped with smoothing the transition of work and files from long-term employee Kathleen Strasbaugh, who retired on November 14.

Legislation and Regulations

During the month the section worked on legislation drafting for the Governor's Office. Additionally, the section edited and legally approved for filing the following regulations projects: 1. Department of Natural Resources (recorder's office fees); 2. Department of Health and Social Services (rates for Medicaid mental health and substance abuse services and for public health newborn metabolic screening services); 3. Board of Barbers and Hairdressers (application; reexamination; temporary permits; licenses; and training); 4. Board of Marital and Family Therapy (license removal requirements); 5. Department of Commerce, Community, and Economic Development, Division of Insurance (military sales practices for life insurance and annuity products; continuing education; surplus lines premium reports; mortality tables; and miscellaneous matters); 6. Department of Revenue (permanent fund dividends); 7. Department of Commerce, Community, and Economic Development, Occupational Licensing (fees for nursing, mortuary science, dental examiners, chiropractic examiners, and veterinary examiners); 8. Department of Fish and Game, Board of Game (hunting seasons and limits for brant).

Natural Resources

Endangered Species Act Issues

There are now six cases in United States District Courts relating to the listing of the polar bear as a threatened species under the Endangered Species Act (ESA). Motions are pending before the U.S. Judicial Panel on Multidistrict

Litigation and in the Northern District of California to centralize the cases in one location. No dates have been set for filing dispositive motions in the state's District of Columbia case. Four conservation groups are seeking to intervene in that case.

On October 22, the National Marine Fisheries Service (NMFS) issued a final rule listing the distinct population segment (DPS) of beluga whales found in Cook Inlet as endangered under the ESA. NMFS also reaffirmed that these beluga whales constitute a DPS, a discrete and significant portion of a species, which is treated as a species under the ESA. This listing decision followed a six-month extension by NMFS to review the 2008 abundance information because of disagreement over the population trend of beluga whales in Cook Inlet. A week earlier, NMFS published a conservation plan prepared under the Marine Mammal Protection Act to identify conservation actions to benefit belugas in Cook Inlet. The ESA listing means that NMFS will next propose to designate critical habitat and begin developing a recovery plan.

Skultka v. Commercial Fisheries Entry

Commission. On November 12, Sitka Superior Court Judge David George issued an opinion affirming the Commercial Fisheries Entry Commission's (CFEC) denial of a Southeastern Roe Herring Purse Seine limited entry permit to Charles Skultka. The sole issue in this case was whether Skultka was entitled to a point for owning a fishing vessel during the qualifying year of 1976.

Skultka operated the M/V Ms. Lindy in 1976, pursuant to an agreement with the vessel's owner of record, Mr. Bert Hansen. Their short, sketchy agreement included a statement that the parties agree that "Charles Skultka, as operator of the vessel, is an owner, and, will be allowed an increasing participation as an Owner of up to 10 percent of the market value of the M/V Ms. Lindy." Skultka claimed that the use of the word "owner" was conclusive, and that the court must

not look beyond the four corners of the agreement for the intent of the parties.

The court concurred with the state that the agreement in this matter was at best ambiguous, and therefore the CFEC was correct to consider extrinsic evidence regarding the ownership question. The weight of the extrinsic evidence in this matter strongly suggested that Mr. Skultka's interest in the M/V Ms. Lindy in 1976 was something other than ownership. Therefore, the court affirmed the CFEC's decision that Skultka had failed to sustain his burden of proving that he owned a fishing vessel during 1976. AAG Tom Lenhart represented the state in this matter.

Rick Ernst, et al., v. State, Department of Natural Resources. In this case, (an appeal to the superior court from the Department of Natural Resources's (DNR) decision to conduct the West Petersville No. 1 Timber Sale), the court entered a decision and order on Nov. 20. The order affirms DNR's decision in all respects, despite challenges claiming that the decision was based on a misunderstanding of several clauses in Article VIII of the Alaska Constitution, and that several agency errors illustrated that no "hard look" had been taken at several important issues. Unfortunately, no buyer has shown any interest in the sale for over two years, despite it having been available (the section defeated an early injunction request) so the agency's hard work may have been in vain. Senior AAG Kevin Saxby represented the state in this case.

Lupie v. Commercial Fisheries Entry Commission. Bethel Superior Court Judge Marvin Hamilton affirmed the Commercial Fisheries Entry Commission's (CFEC) decision to deny a limited entry permit for the Kuskokwin salmon gillnet fishery to the heirs of Nick Lupie. The entire Lupie family has a long history of participation in the Kuskokwin salmon fishery. The applicant, Nick Lupie, participated in this fishery for much of his life, but during the critical qualifying years he chose to not obtain a gear license in his name. Instead, during these

two years, Nick apparently fished with his son, who held the license in his name. Thus, the central issue in this case is whether the fishing partner of a gear license holder is entitled to income dependence points, where the regulation limits the award of such points to the gear license holder.

In *CFEC v. Templeton*, 598 P.2d 77, the Alaska Supreme Court ruled that fishing as a partner of a gear license holder may constitute a "special circumstance" and thus entitle the applicant to points under the special circumstances provision in CFEC regulations. However, the applicable regulations in the Kuskokwin fishery are different than in the original 19 regulated fisheries that were considered in *Templeton*. In the Kuskokwin fishery, an applicant who was a partner of a gear license holder needs to prove that the applicant's failure to obtain a separate gear license was an "unavoidable circumstance" rather than merely a "special circumstance".

Judge Hamilton noted in his decision that he was very sympathetic to Mr. Lupie's situation. However, he was also persuaded that while fishing as a partner without a gear license of your own may be a special circumstance, it is not an unavoidable circumstance and therefore the CFEC correctly applied the regulations in denying this permit. AAG Tom Lenhart represented the state in this matter.

Copper Timber Sale

The Palmer Superior Court upheld the Department of Natural Resources (DNR) commissioner's decision to offer the Copper Timber Sale, near Willow. The appellant, Alaska Center for the Environment (ACE), alleged that DNR's land use plans governing the sale were regulations and that DNR had violated the "regulatory plans" by failing to update them in accordance with aspirational statements in the plans regarding the schedule for plan revisions. ACE also claimed that DNR's failure to revise or update the plans prevented DNR from effectively adhering to statutory and constitutional mandates that require DNR to use

the best available data, manage for sustained yield, and act in the state's best interest. The court found that the statutes requiring DNR to create and maintain land use plans give the agency discretion in the formation and review of those plans, and that DNR did not abuse its discretion in offering the Copper Timber Sale without revising the plans. The court also found that the sale complied with the best available data and sustained yield requirements as well as the best interest test. AAG Anne Nelson represented the Division of Forestry in this case.

Opinions, Appeals and Ethics

AAG Judy Bockmon addressed a variety of informal ethics inquiries by email and phone on a regular basis during the month. With the approval of the Attorney General, she served a complaint in the matter referred from the Department of Military and Veteran's Affairs. She also prepared an informal Attorney General's opinion advising the Department of Natural Resources's ethics supervisor about a disclosure from a division director. She also has two matters under review regarding issuance of a complaint on referral from that department. Additionally, AAG Bockmon processed two complaints against the Governor to the Personnel Board.

Appeals and Other Litigation

During November, the section continued to assist the Governor's Office with responses to the many public records requests received during the past three months.

Kiesel v. Seven Subpoenas, S-13322. The section filed an appeal in the Alaska Supreme Court concerning subpoenas that the Senate Judiciary Committee issued for Stephen Branchflower's recent investigation. The appeal was filed on behalf of seven state employees who received subpoenas from the committee and decided to contest the subpoenas' validity. The purpose of the appeal is to preserve the

employees' right to challenge the subpoenas' validity if the Senate attempts to act against them for failing to appear before the committee. To avoid spending resources unnecessarily, the section has asked the Alaska Supreme Court to stay the appeal while it is determined whether the Senate intends to act against the employees. In response to the section's motion, the legislator defendants have asked the court to dismiss the appeal. AAG Dave Jones is handling the appeal.

Kraft v. State of Alaska, Department of Natural Resources. AAG Mary Lundquist completed the opening brief in this case. The case arises peripherally from Ballot Measure 4, the Clean Water Initiative, which was up for vote in the August statewide elections. The main focus of the complaint before the Alaska Public Offices Commission (APOC) was whether a Department of Natural Resources (DNR) website discussing Ballot Measure 4 violated the expenditure and reporting requirements of AS 15.13.145 and AS 15.13.040. The claims regarding the DNR website were settled in the first days of the proceedings. However, APOC requested briefing on the issue of whether comments made by a public official regarding how the official was personally going to vote on the ballot measure violated AS 15.13.145 and AS 15.13.040. These statutes restrict the use of state money to influence the outcome of an election on a ballot proposition unless the funds have been specifically appropriated for that purpose by state law, and set out reporting requirements for campaign expenditures.

It is the state's position that the official's comments required no expenditure of money so the comments did not support a violation of AS 15.13; that even if there was an expenditure of money it was de minimis; that an expression of how one is going to vote on a ballot measure is a matter of free speech; and even if there was an expenditure, it was part of the official's usual and customary duties to respond to press questions and therefore under regulation, there is no violation of AS 15.13.145. Briefing in this case will be completed in January.

Dennis v. State, Bureau of Vital Statistics. In this case, Mr. Dennis is asking the Bureau of Vital Statistics to issue a new birth certificate with his name on it based on a tribal paternity order. The tribe had issued an order finding that Mr. Dennis was the child's father and had ordered the state to issue a new birth certificate. In accordance with state statute, the Bureau had already issued a birth certificate with the mother's husband's name on it.

It is the state's position that Mr. Dennis should have pursued the birth certificate issue in an ongoing superior court case where he had appeared as the child's father. In addition, even if it was appropriate for the tribe to have acted on the paternity issue, a state court needs to perform a comity analysis to ensure that the tribe had subject matter jurisdiction, had personal jurisdiction over the parties, and that the due process rights of the parties were complied with.

Following oral argument on the motions for summary judgment, the state submitted recommended procedures for comity recognition of tribal court paternity orders where all of the parties are members of the tribe.

The recommended procedures would allow streamlined submission of certain tribal paternity orders to the court for comity recognition (as well as streamlined consideration by the superior court). The tribe has moved to strike the state's recommended procedures. The state is working on its opposition to the motion to strike. AAG Mary Lundquist is handling this case.

State v. Jacob, A-13226. The state filed its appellants brief in this appeal, the second in the case. In this action, David and Joyce Jacob asserted that the Office of Children's Services failed to notify them of proceedings in their grandchildren's child-in-need-of-aid (CINA) cases, and they claimed that they were entitled to physical custody of the children. They sought declaratory and injunctive relief on their own behalf and injunctive relief on behalf of all other similarly-situated grandparents. The superior

court dismissed the case, instructing the Jacobs to seek substantive relief in their grandchildren's CINA case. The Jacobs intervened in their grandchildren's CINA case, but they also appealed their original action to the Alaska Supreme Court. By the date of oral argument, they no longer sought placement of the children in their home or relief on behalf of all other grandparents. They sought only a declaration that the state had failed to send them the notices and that they were entitled to receive them, points that the state had never disputed. The Court held that they were entitled to such a declaration, but it did not award attorney's fees to any party, ordering each side to bear its own costs and fees.

After the Court issued its decision, the Alaska Immigration Justice Project substituted in for Alaska Legal Services and claimed full attorney's fees, which the superior court granted. The state appealed. It argued in its appellant's brief that the Alaska Immigration Justice Project is not entitled to fees because the Jacobs were not the prevailing parties in the case. Alternatively, if they were prevailing parties, they are not entitled to full fees because the Jacobs did not prevail on a constitutional issue. They also are not entitled enhanced Rule 82 fees, both because they failed to establish that they qualify for them and because the record does not support enhancement. AAG Joanne Grace is handling this appeal.

Regulatory Affairs and Public Advocacy (RAPA)

Testimony Filed

U-08-61, FNG exemption. On June 6, the Regulatory Commission of Alaska (RCA) opened a proceeding to investigate Fairbanks Natural Gas, LLC's (FNG) exemption from rate regulation in response to a letter from certain members of the Alaska State Legislature. In Docket U-03-48(1) dated January 31, 2003, the RCA previously approved FNG's exemption from regulation under

AS 42.05.711(d). Certain legislators, including Rep. Jay Ramras of Fairbanks, asserted that the Fairbanks gas market had matured to the point that the commission should now remove the exemption from regulatory oversight in order to address gas price increases and cost-prohibitive fuel-switching alternatives to gas.

The Attorney General/RAPA elected to participate in the proceeding on June 20 and pre-filed the direct testimony of staff witness Parker Nation, CPA, and contract economist Cristina Klein on October 31. Mr. Nation's testimony concluded that, based upon unadjusted historical information, FNG did not appear to be over-recovering gas utility revenue at this time. (Under-recovery would normally be justification for a rate increase to a regulated utility.)

Ms. Klein's testimony considered the RCA's bases for granting the original FNG exemption and analyzed the current heating/energy market in Fairbanks. Ms. Klein found: that the heating oil market is competitive; that many commercial customers have the ability to inexpensively switch fuels between gas and heating oil; and that only FNG's very small share (1.27 percent) of the residential heating market involves captive customers. She concluded that the price of fuel oil should be the price cap for FNG's *residential* gas customers (unless lower-priced North Slope gas becomes available), and that the Commission should revisit the question of rate regulation of FNG if its overall market share reaches 25 percent of the Fairbanks heating market.

FNG's responsive testimony is due December 5 and an adjudicatory hearing is scheduled for February 2009.

Adjudicatory Hearing

U-07-78, Goat Lake Hydro. Goat Lake Hydro, Inc. (GLH) is a wholesale producer of hydroelectric power near Skagway that sells all of its power to its regulated affiliate, Alaska Power Co. (APC). On May 18, 2007, GLH

filed a proposed kWh rate increase to 'true-up' its rate stabilization account previously approved by the RCA. Inside Passage Electric Cooperative, Inc. is the customer of APC.

On May 12, the Attorney General/RAPA pre-filed the direct testimony of staff witness Janet Fairchild which challenged the reasonableness of various aspects of the utility's filing, including the proposed rate increase, the proposed rate stabilization account, the revenue requirement, and the proposed treatment of interest arbitrage. An adjudicatory hearing was conducted by the RCA on November 14 at which time the witnesses of both parties were cross-examined. AAG Sam Cason was RAPA litigation counsel at hearing. A commission decision is pending.

New Cases

Alaska Pacific Environmental Services (APES) Refuse Cases

U-08-124. On September 16 Alaska Pacific Environmental Services (APES) filed a tariff revision with the Regulatory Commission of Alaska (RCA) seeking to permanently increase rates for refuse collection services in Ketchikan by 4 percent. The Attorney General/RAPA filed comments on October 24 that recommended suspension of the filing for further investigation of the reasonableness of the proposed rates, and filed a notice of election to participate in the docket on November 5. The Attorney General/RAPA pre-filed direct testimony due on May 15, 2009 and an adjudicatory hearing is scheduled to begin on August 17, 2009.

U-08-125. On September 16, APES filed a tariff revision with the RCA seeking to permanently increase rates for refuse collection services in Dutch Harbor by 20 percent. The Attorney General/RAPA filed comments on October 24 that recommended suspension of the filing for further investigation of the reasonableness of the proposed rates, and filed a notice of election to participate in the docket on November 5. The Attorney General/RAPA pre-filed direct testimony

due on May 15, 2009 and an adjudicatory hearing is scheduled to begin on August 17, 2009.

U-08-126. On September 16, APES filed a tariff revision with the Regulatory Commission of Alaska seeking to permanently increase rates for refuse collection services in Nome by 19 percent. The Attorney General/RAPA filed comments on October 24 that recommended suspension of the filing for further investigation of the reasonableness of the proposed rates, and filed a notice of election to participate in the docket on November 5. The Attorney General/RAPA pre-filed direct testimony due on May 15, 2009 and an adjudicatory hearing is scheduled to begin on August 17, 2009.

U-08-127. On September 16, APES filed a tariff revision with the Regulatory Commission seeking to permanently increase rates for refuse collection services in Juneau by 5 percent. The Attorney General/RAPA filed comments on October 24 that recommended suspension of the filing for further investigation of the reasonableness of the proposed rates, and filed a notice of election to participate in the docket on November 5. The Attorney General/RAPA pre-filed direct testimony due on May 15, 2009 and an adjudicatory hearing is scheduled to begin on August 17, 2009.

Torts and Workers' Compensation

The superior court granted summary judgment to the state on all claims in a wrongful death case involving an infant who died while enrolled at a state-licensed daycare in Metlakatla. Plaintiffs sued the Metlakatla Indian Community, which owned and operated the daycare, the Metlakatla mayor, the daycare administrator, and the Department of Health and Social Services. Plaintiffs raised negligence and equal protection claims against the state, asserting that it negligently licensed the daycare, failed to monitor daycare conditions, and failed to revoke grant monies and/or suspend the daycare's license

upon learning of alleged licensing violations. The court found that AS 47.32.160, which provides that the department and its employees are not liable for civil damages for claims arising out of the licensing and monitoring of licensed facilities, immunized the state for its licensing and oversight activities. The court also concluded that the state owed no duty to non-negligently administer grant funding and that no causal connection existed between the state's grant funding to Metlakatla and the infant's death. Judge Thompson also rejected plaintiff's due process and equal access challenge to AS 47.32.160, determining that the provision was a rational preservation of the state's sovereign immunity. Finally, the court declined to recognize a private cause of action for violation of the Alaska Constitution where plaintiffs had alternative remedies available against four other named defendants. The case was defended by AAG Janell Hafner.

Summary judgment was granted this month by U.S. District Court Judge Beistline granting qualified immunity and dismissal from the lawsuit of an Alaska State Trooper sued for actions arising out of a search. Plaintiffs sued the trooper, a North Pole City Police Officer, and the North Pole City Police Dept. in federal court for §1983 violations. The trooper and a North Pole police officer conducted a search of plaintiffs' property pursuant to consent from short-term tenants/guests at the property. The trooper observed evidence during the consensual search that led to the issuance of a search warrant for the property. A large amount of stolen property (snow machines, four wheelers, jet skis, construction materials, etc.) was seized pursuant to the search warrant, and one of the plaintiffs was charged with felony theft in state court. All of the evidence was ultimately suppressed, and the charges dismissed, upon a finding that the consent for the initial search was invalid. The plaintiffs sued the officers that conducted the initial search claiming that the officers had violated the plaintiffs' right to be free from unreasonable searches and seizures. Although the state court determined that the status of the short-term tenant/guest was not sufficient to support the

claimed consent for the initial search, an affidavit from the short-term tenant/guest confirming tenancy and consent was sufficient to support the trooper's claim of qualified immunity (i.e., the trooper reasonably relied upon the tenant/guest's authority to grant consent under the law in effect at the time). Judge Beistline also found that the plaintiffs' § 1983 claims were without merit. The trooper was defended by AAG Gene Gustafson in this matter.

Transportation

Telephone Hill Garage

The State of Alaska executed a lease allowing the City & Borough of Juneau to move forward with construction of a parking garage on Telephone Hill in downtown Juneau. AAG Geoffrey Wildridge assisted with the lease.

Mat-Su Prison

AAG Jeff Stark continued assisting with financing issues to enable the Mat-Su Borough to issue bonds to construct a prison. The Department of Corrections will house state prisoners in the new prison.

Kotsina River Navigability Claim

The state filed a claim that the lower Kotsina River is navigable, and thus owned by the state. The claim was lodged in the context of ongoing litigation between the Department of Transportation & Public Facilities and Ahtna, Inc. AAGs Leone Hatch and Michael Sewright pulled the state's oar preparing this navigability claim.

CRIMINAL DIVISION

Anchorage DAO

Anchorage and Dillingham conducted 9 trials and 44 grand juries during the month.

New ADAs Melissa Wininger-Howard and Josh Kindred got their "first wins". ADA Wininger-Howard prosecuted a case against a man who made threatening gestures toward a pair of police officers. ADA Kindred prosecuted a man for drunk driving.

ADA Clint Campion, new to the office, though not new to prosecution, got his first two wins – against a recidivist thief and a domestic violence batterer.

ADA Rob Henderson completed the long saga of Tadd Sheffield, a 2006 case involving guns and drugs.

ADA Taylor Winston tried Douglas Artemie for the brutal "fisting" rape of a woman who he'd just met that evening. The assault took place in her home. She testified that the self-absorbed Artemie combed his hair and primped in the mirror while she sat bleeding. Only surgical intervention saved her life. The jury found that the sexual assault was "most serious" within the class of offense. Since the crime was old (this was a retrial after a hung jury and an appeal of the trial judge's decision to mistry the case after only six hours of deliberations), the sentencing range is 8 to 30 years.

ADA Ben Hofmeister went to sentencing on a case he tried over the summer. Annie Shinnault was a three-time convicted felon; she was sentenced to 55 years for the kidnapping, sexual and physical assault of a prostitute who had stolen drugs from a co-defendant of Shinnault's.

Fairbanks DAO

A 24-year-old Fairbanks man was sentenced to 45 years in prison, with 15 years suspended, following his conviction for murder in the second-degree. On January 14, 2008 this defendant shot and killed a 22-year-old Fairbanks man who ran in the same dysfunctional circle of "friends" as the defendant. In a dispute over a loaned handgun, the victim was killed by a "warning

shot” which hit him in the back of the neck. The victim himself was known to often possess an AK47, and the defendant claimed to have acted in an anticipatory self-defense. At this defendant’s sentencing the mother of the victim gave a heart-rending lecture to the defendant about the futility and senselessness of gun violence by today’s youth culture, a culture in which even the slightest insult is all too often quickly escalated into gun violence. After his release from prison this defendant will be placed on supervised probation for ten years under conditions which include that he consume no alcohol or drugs and that he not possess any weapon, including any knife with a blade longer than three inches.

As an example of exactly what this mother was talking about, another 23-year-old Fairbanks man was sentenced to 36 months in prison, with 18 months suspended, following his conviction for assault in the second-degree. This assault began on a pleasant April night when the defendant attempted to call his girlfriend on her cell phone as she was socializing at a local Fairbanks bar. For reasons which remain unclear to this day, this girl’s cell phone was passed from patron to patron around the bar, until it eventually reached a 24-year-old man who was at the bar having a drink with his 54-year-old father. A verbal disagreement of some magnitude ensued between the defendant and this bar patron, which ended with the defendant threatening to come to the bar to kill the patron and his father. This relatively youthful bar patron, of course, couldn’t possibly be seen backing down from a fight, and showing that historic good judgment that is often found to descend upon those found socializing in bars, invited the defendant to “come on down”. To demonstrate their good faith and kind disposition, this son and father duo even offered to reimburse the defendant for his gasoline expenses in doing so.

These folks were total strangers, never having met or even talked with each other prior to this evening. The defendant, of course, just couldn’t

leave well enough alone either, and anxious to meet his new-found friends, was observed arriving at the bar about 45 minutes later clad in his pajama bottoms. After exchanging verbal pleasantries at the bar, the defendant headed outside to his car, no doubt to check his odometer to calculate the amount of his anticipated fuel reimbursement. He was of course followed outside by father and son. When this trio reached the defendant’s car, the defendant reached into his car, pulled out a handgun, and fired three shots in the general direction of the father and son, hitting the father in the leg with his last shot. At this point the father and son withdrew their fuel reimbursement offer, and the authorities were called. At his sentencing the defendant said “I don’t know how this escalated. I’m really not a violent person. I didn’t have any intent to harm anyone”. Perhaps it escalated when he armed himself with a 9mm revolver and left his home to drive to a bar to meet two total strangers he’d just threatened to kill.

Another all too-common scenario ended with another 21-year-old Fairbanks man being sentenced to 36 months in prison with 24 months suspended for assault in the second-degree predicated by a June one-car accident in which he had been determined to be the driver. Following a night in which he admitted to having consumed a half-gallon of tequila and other alcoholic beverages, he thought nothing of attempting to drive a friend home. This “kindness” ended when he lost control of his Chevrolet 2500 pickup truck with extended cab while attempting to negotiate a curve at what the police estimated to be 45-60 miles per hour. When the driver lost control of his truck it traveled approximately 10 feet off the roadway and struck a tree so hard that the truck bounced back onto the roadway. The police arrived to find the severely damaged truck and a passenger with two apparent broken legs and other injuries which were later determined to include a fractured pelvis, lacerated liver, and a bruised lung. The defendant, not having broken *his* legs, abandoned his injured passenger and fled the scene before the police arrived. Investigation revealed that this

defendant had also been driving on a suspended license. Indicted for assault in the first-degree, felony leaving the scene of an injury accident, driving while under the influence, and driving on a suspended license he entered a plea to assault in the second-degree and driving while intoxicated, with the other two charges being dismissed as part of the plea agreement.

On November 14, police dispatch received a 911 call from a citizen reporting hearing a woman screaming for help in the apartment above his. When the police arrived approximately three minutes later they went to and entered the apartment above the good-citizen caller only to find the apartment unoccupied. While in the upstairs apartment the police themselves heard the screams of an obviously distressed female yelling for help. The responding officers followed their ears, which took them to the darkened building floor *below* the caller's apartment. Upon entering what was later determined to be the apartment building laundry room, the officers were able to locate the screaming woman who was being raped by a 20-year-old Fairbanks man. The police literally pulled the man off the victim, who was found to have been beaten so severely that both of her eyes were swollen shut. When taken to the hospital, her nose was determined to have been broken. Upon being arrested the man declined to make any statements regarding the alleged rape, but did admit to "slapping" the woman, claiming that "she's my girlfriend, what's wrong with that?" This defendant was subsequently indicted for first-degree sexual assault, two counts of assault in the second-degree for his multiple attempts to choke out the victim to keep her from screaming, and multiple counts of felony and misdemeanor assault for her various injuries. A January trial date is pending.

Kodiak DAO

Business in the office remained steady during the month of November.

The month began with the successful conclusion of a sexual abuse of minor trial. A Kodiak jury convicted 37-year-old Jason Reandeau of sexual abuse of a minor in the second-degree and misdemeanor assaults following a two-week jury trial before Judge Peter Ashman. On January 1, 2008, Reandeau was discovered by his live-in girlfriend naked in bed with her 15-year-old daughter. The jury was presented with a bifurcated count of failure to register as a sex offender after returning verdicts on the main counts. Reandeau was also convicted of this C felony. Based upon his prior sex offense, he faces a presumptive term of 15 to 30 years. Sentencing is set for February 2009.

Early in the month a Kodiak man was indicted for felony assault after threatening his wife with a Victorinox knife. Children in the house witnessed the assault.

Mid-month the grand jury indicted a man for criminal mischief after he was identified as the person who shattered a restaurant window in the downtown area.

A Kodiak man was indicted for 11 counts of possession of child pornography. Police responded to a report of a domestic disturbance and found a couple fighting regarding the man's viewing of the pornography.

Mid-month a Kodiak man was sentenced in two separate cases following his guilty pleas to attempted sexual abuse of a minor in the second-degree and attempted sexual assault in the second-degree receiving consecutive sentences of 12 years with 10 suspended.

A Kodiak man was convicted of burglary in the second-degree for his involvement in break-ins at the high school and a local church. He was also convicted separately for theft in the second-degree after pleading guilty to a break-in and theft from a local sporting goods store.

Nome DAO

Jordan Adsuna received a ten year sentence for second-degree sexual assault. Adsuna was on probation for burglary when he assaulted his sleeping victim.

Ray Asila received a sentence of 20 years with 8 suspended for sexually abusing a minor. The fifty-seven-year-old Asila is a second sexual felony offender.

Palmer DAO

Palmer Grand juries indicted 33 people on new felony charges during the month.

On November 3, Donald Voorhis was sentenced to serve 45 years in prison with additional suspended time and probation for an armed standoff with Alaska State Troopers near Talkeetna in 2006. A Palmer jury convicted Voorhis in July of attempted murder, seven counts of felony assault, and three misdemeanors. Voorhis shot at a neighbor and pointed a rifle at two other neighbors. When Sgt. Walter Blajeski showed up at Voorhis' trailer with an arrest warrant, Voorhis pointed a rifle at him. Troopers eventually surrounded the trailer and tried talking him out. When negotiations failed, they employed chemical munitions. On the third day, State Trooper Investigator Nathan Bucknall entered into the trailer to arrest Voorhis. Voorhis fired a .22 rifle at Bucknall and Bucknall returned fire. No one was injured. After the shooting, troopers tried using high-pressure water and dragging the trailer by its hitch. Voorhis surrendered after troopers used a bulldozer to tear off the front of the trailer. Judge Smith commented during the sentencing that troopers are entitled to do their jobs safely. The prosecutor was DA Roman Kalytiak.

Billyjack Wigglesworth was convicted after a jury trial of six counts of misconduct involving a controlled substance in the second-degree and

one count of burglary in the first-degree for his participation in a methamphetamine laboratory. There were delays in the trial due to a juror and the defense attorney getting sick. The jury heard from 16 witnesses and considered over 130 exhibits. ADA Rick Allen prosecuted the case.

A Palmer jury convicted Paul Brott of failure to register as a sex offender for failing to notify the state when he moved and failing to send his annual registration. Brott claimed he was confused because he moved here from Texas and was still following their rules. ADA Rachel Gernat prosecuted the case.

ADA Rachel Gernat prosecuted the following:

Tony Katulski was sentenced to serve 20 years on a count of sexual abuse of a minor in the first-degree. Katulski sexually abused his stepdaughter for about two years. Judge Cutler gave him 20 years instead of 25 because he confessed. John Groff pled to one consolidated count of sexual abuse of a minor in the first-degree for abusing three grandchildren and agreed to a 45-year sentence. Burton Naczi was sentenced to 60 years, with 30 years suspended, pursuant to his guilty plea to murder in the second-degree for the death of his six-month-old daughter. Naczi originally told police that he had fallen down the stairs with the baby, but later admitted he had shaken her and thrown her on the couch. George Long received a sentence of nine months, with six months suspended, after being convicted of assault in the fourth-degree for tying up his adoptive grandson with a dog chain.

ADA Jarom Bangerter prosecuted the following cases:

Glennallen juries convicted Craig Baird of theft in the second-degree, driving while license revoked, and tampering with license plates. They also convicted Michael Voyles of driving while license revoked. Acquitted was Daniel Cruz of assault in the third-degree.

ADA Mike Perry was the prosecutor for these cases:

Valdez juries convicted Jeremy Duncan of sexual abuse of a minor in the first-degree (a 20-month-old girl) and William Wallis of driving while license revoked.

Russell Blakeman, Jr. was convicted by jury in Palmer of felony refusal of a breath test, felony eluding and driving while license revoked. After a brief chase on and off-road, Trooper Ron Hayes found the truck he was pursuing in a ditch. Jared Jamison, the owner of the truck, was found a few blocks away, but was not identified by Hayes as the driver. Trooper Hayes found Blakeman asleep on the couch in Jamison's house and identified him as the driver by the tattoos on his hands. A police dog also followed Blakeman's trail from the truck to the yard of the house where he was found. ADA Kerry Corliss was the prosecutor.

Office of Special Prosecutions and Appeals (OSPA)

Rural Prosecution Unit

The Rural Prosecution Unit traveled extensively this month to Bethel, Kotzebue, and Barrow.

Several cases from the Bethel DAO have been reassigned to rural prosecutors.

The unit obtained an indictment charging an individual with several counts of sexual abuse of a minor.

After a lengthy investigation, a Kotzebue Grand Jury returned an indictment for a major drug case.

Two cases of child pornography from Barrow and Prudhoe Bay were resolved by the office.

The office has taken a death and serious physical injury case from the Kotzebue office to review for potential prosecution.

SAVE THE DATE

Juneau Holiday Party – December 10

Anchorage Holiday Party – *The Holidays Through the Decades* – December 17